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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.7

No. 147.

PANHANDLE EASTERN PIPE LINE COMPANY, a corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered April 21, 1947, dismissing *sua sponte* its petition to have reviewed and set aside an order of the Federal Power Commission under the Natural Gas Act of 1938 (52 Stat. 821; 15 U. S. C., 717 *et seq.*), as amended by the Act of February 7, 1942 (56

Stat. 83), which order purported to issue a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company,[1] and certain related orders.

ORDERS BELOW.

The orders of the Federal Power Commission[2] will be found in R. 21 to R. 48, and are entitled as follows:

(1) "Findings and Order Issuing Certificate of Public Convenience and Necessity", dated November 30, 1946 (R. 21), as modified by order dated December 14, 1946 (R. 29).

(2) "Findings and Order Denying Motion of Intervener Panhandle Eastern Pipe Line Company to Dismiss Application of Michigan-Wisconsin Pipe Line Company", dated November 30, 1946 (R. 31).

(3) "Order Supplementing Order Issuing Certificate of Public Convenience and Necessity and Reopening Proceeding for Limited Purpose", dated December 30, 1946 (R. 35).

(4) "Order Fixing Date of Hearing on Reopened Proceedings for Limited Purposes", dated January 3, 1947 (R. 43).

(5) "Order Denying Applications for Reconsideration and Vacation, or, in the Alternative, for a Rehearing of Order Issuing Certificate of Public Convenience and Necessity", dated January 14, 1947 (R. 45).

(6) "Order Denying Application of Panhandle Eastern Pipe Line Company for Rehearing of Denial of Motions to Dismiss", dated January 14, 1947 (R. 48).

The order of the Court of Appeals will be found at R. 179. Said order was issued without opinion.

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[1] Hereinafter sometimes called "Michigan-Wisconsin Company".

[2] Subsequent to the filing of the petition for review in the Court below, the Commission issued a supplemental opinion and order. These will be found in R. 154 and R. 173, respectively.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act (52 Stat. 831; 15 U. S. C., Sec. 717 r(b), and Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C., Sec. 347(a)).

STATUTE INVOLVED.

The pertinent provisions of the Natural Gas Act, approved June 21, 1938 (52 Stat. 821, 15 U. S. C. 717), as amended by the Act of February 7, 1942 (56 Stat. 83, 15 U. S. C. 717f), are set forth in the Appendix hereto (pp. 21 to 25).

QUESTIONS PRESENTED.

1. Whether the order of the Federal Power Commission dated November 30, 1946, purportedly "issuing a certificate of public convenience and necessity" to Michigan-Wisconsin Pipe Line Company, and the related orders dated November 30, 1946, December 30, 1946, January 3, 1947, and January 14, 1947, are "final" orders reviewable under Section 19(b) of the Natural Gas Act?

2. Whether the Federal Power Commission, having purported, by its order of November 30, 1946, to "issue" a certificate of public convenience and necessity, is empowered to extend the period of time within which applications for rehearing and petitions for review are required to be filed by Sections 19(a) and 19(b) of the Natural Gas Act?

STATEMENT.

Petitioner produces and purchases large quantities of natural gas in the Texas Panhandle and Hugoton gas fields in the States of Texas, Oklahoma and Kansas, and owns and operates a transmission pipeline system extending from such fields through portions of the States of Texas,

Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio to northern termini in Michigan, including necessary compressor stations and other facilities required to deliver gas to its markets in said States. The greater portion of the main transmission line is a parallel looped line varying in size from 20 to 26 inches in diameter (R. 5, 100). Large volumes of gas are transported through said pipeline and sold by petitioner to Michigan Consolidated Gas Company [3] for resale and distribution by the latter to consumers in the cities of Detroit and Ann Arbor and their environs in Michigan. The entire natural gas requirements of said cities and environs have been supplied by petitioner continuously since 1936, approximately 25 to 27 per cent of petitioner's income being derived from sales of natural gas for ultimate public consumption therein (R. 6, 100).

The operations in which petitioner is engaged, including its service to the Detroit and Ann Arbor areas, are duly authorized by a "grandfather" certificate of public convenience and necessity [4] and other certificates of public convenience and necessity heretofore issued by the respondent, Federal Power Commission, pursuant to Section 7(c) of the Natural Gas Act, as amended (52 Stat. 824; 15 U. S. C. 717 f(c), as amended by the Act of February 7, 1942, 56 Stat. 83). Each of such certificates is validly outstanding and presently in force (R. 6, 100). In reliance upon the complete validity of said certificates, petitioner, in carrying out a progressive program of expansion, has constructed, acquired, and operated at great cost substantial additions to its pipeline system for the purpose of enabling it to continue to serve adequately the Detroit and Ann Arbor areas and other markets. The construction, acquisition and operation of such additional facilities have been duly authorized by the Commission after finding that

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[3] Hereinafter sometimes called "Michigan Consolidated".

[4] 4 F.P.C. 1081

the same were required by the present or future public convenience and necessity (R. 6, 100-1).[5]

On September 24, 1945, Michigan-Wisconsin Company filed an application (which was amended on March 13 and July 22, 1946) before the Commission in a proceeding entitled "In the Matter of Michigan-Wisconsin Pipe Line Company", Docket No. G-669, requesting a certificate of public convenience and necessity to authorize the construction and operation of a proposed natural-gas pipeline extending from Hansford County, Texas, in the Hugoton gas field, through the States of Oklahoma, Kansas, Missouri, Iowa, Wisconsin, Illinois and Indiana, and terminating in the Austin gas storage field in Mecosta County, Michigan, some 140 miles northwest of Detroit. Authorization was also sought by the Michigan-Wisconsin Company to operate under a lease from its affiliate, Michigan Consolidated, all of the latter's existing facilities in the Austin and Reed City storage fields, certain additional facilities proposed to be constructed by Michigan Consolidated in those fields, and certain existing transmission lines of the latter, all located in the State of Michigan. The application also requested that Michigan-Wisconsin Company be authorized to operate under lease a proposed pipeline from the Austin field to Detroit, and lateral lines extending therefrom to Ann Arbor and Mt. Pleasant, Michigan, to be thereafter constructed by Austin Field Pipe Line Company, a newly organized subsidiary of Michigan Consolidated. Moreover, the application requested that Michigan-Wisconsin Company be authorized to acquire all of such leased facilities as of December 31, 1951, and thereafter to continue to operate same. Michigan-Wisconsin Company proposed by means of this project to supply natural gas to

[5] As of March 31, 1946, petitioner's assets totaled $128,506,510, of which amount $113,634,145 represented gas plant. On that date petitioner had outstanding bonds and notes totaling $46,250,000, preferred stock totaling $14,000,000 and common stock, together with surplus, amounting to $37,413,013. These securities are widely held by the public (R. 101).

Michigan Consolidated for resale in the following communities in Michigan in which the latter owns gas distribution facilities, namely: Detroit, Ann Arbor, Mt. Pleasant, Grand Rapids, Muskegon, Greenville-Belding, Big Rapids, and their environs. Initially and until December 31, 1951, Michigan-Wisconsin Company proposed to furnish to Michigan Consolidated only such quantities of natural gas as may be required in excess of the volumes being supplied to the Detroit and Ann Arbor areas by petitioner under petitioner's existing contracts with Michigan Consolidated. After December 31, 1951, the end of the term of such contracts, Michigan-Wisconsin proposed to supply the entire natural-gas requirements of Michigan Consolidated and thereby completely to displace petitioner as the wholesale natural-gas supplier of the Detroit and Ann Arbor market [6] (R. 3-5, 101-102).

By order of November 27, 1945, petitioner was permitted to intervene in the proceeding before the Commission in opposition to the granting of the application (R. 49).

Prior to the taking of any evidence, petitioner filed with the Commission on April 5, 1946, a motion requesting an immediate order dismissing the application of Michigan-Wisconsin Company on the ground that the Commission lacked jurisdiction under the Natural Gas Act to issue a certificate authorizing Michigan-Wisconsin Company to supply the markets which petitioner was presently serving and duly authorized to continue to serve under validly outstanding "grandfather" and "non-grandfather" certificates of public convenience and necessity (R. 7, 31). Oral argument was heard on such motion April 15, 1946, but the Commission deferred ruling thereon, and, over objection,

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[6] Michigan-Wisconsin company also proposes to supply the entire natural-gas requirements, at the city gates, of Milwaukee, Racine, Beloit, Janesville, Madison, Green Bay, Sheboygan, Appleton, Oshkosh, Fond du Lac, Manitowoc, Two Rivers and Stoughton in the State of Wisconsin; Mt. Pleasant, Burlington, Ft. Madison and Keokuk in the State of Iowa; and Maryville in the State of Missouri (R. 5).

proceeded to hear all the evidence in the proceeding commencing on April 16, 1946 and continuing thereafter from time to time until November 13, 1946 (R. 7). After Michigan-Wisconsin Company rested its case, petitioner, on October 25, 1946, again moved for dismissal of the application. Ruling thereon was also deferred (R. 7). After the close of all the evidence, petitioner filed on November 19, 1946, a further motion to dismiss the application (R. 7).[7]

Following the completion of the taking of evidence on November 13, 1946, the hearing was recessed to November 20, 1946, for oral argument. Over the objection of petitioner and other interveners, the Commission refused to allow for the filing of main and reply briefs and refused to grant additional time for the adequate preparation of oral and written argument, notwithstanding the fact that the record consisted of more than 12,500 pages of transcript of testimony and in excess of 400 voluminous exhibits. Oral argument was concluded on November 23, 1946 (R. 7).

Under date of November 30, 1946 (seven days after the close of the hearing) a majority of the five members of the Commission, Chairman Olds and Commissioner Draper dissenting, entered its order purportedly "issuing a certificate of public convenience and necessity" authorizing Michigan-Wisconsin Company to construct and operate (a) the proposed main transmission pipeline from Hansford County, Texas, to the Austin Storage Field located near Big Rapids, Michigan; (b) an initial compressor station to be located in Hansford County, Texas; (c) a compressor station to be located near Mt. Pleasant, Iowa; (d) a so-called Wisconsin branch line; and (e) lateral pipelines necessary to serve

[7] The grounds of such motion were that: (1) The Commission is without power under the Natural Gas Act to deprive petitioner of its "grandfather" markets by the issuance of a certificate to Michigan-Wisconsin Company; (2) the Commission cannot lawfully issue a certificate to Michigan-Wisconsin Company, since petitioner is willing and able properly to perform the service proposed; and 3) Michigan-Wisconsin Company had not shown that it is able properly to do the acts and to perform the service proposed (R. 31).

certain communities in Michigan named in the amended application, other than Mt. Pleasant, Ann Arbor and Detroit. Such order also purported to authorize Michigan-Wisconsin Company to operate the existing facilities located in the Austin and Reed City storage fields owned by Michigan Consolidated (R. 8, 21). It is clear from the context of the order that one of the major purposes of the certificate was to enable Michigan-Wisconsin Company to supply natural gas for resale in petitioner's established market in the Detroit and Ann Arbor areas (R. 21).

Said order was made subject to the condition, among others, that the facilities authorized shall not be used for the transportation for or sale of gas to Michigan Consolidated for resale in Detroit and Ann Arbor "except with due regard to the rights and duties of Panhandle Eastern in its established service for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act", such rights and duties to be determined by supplemental order to be issued within 15 days thereafter.[8] Jurisdiction was specifically reserved by the Commission to reopen the proceeding, if need be, for the purpose of such determination (R. 9, 27). The order further provided that:

> "For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later" (R. 28).

The order of November 30, 1946, moreover, required Michigan-Wisconsin Company, within fifteen days after the issuance of the supplemental order, to "notify the Commission in writing whether the certificate *as herein issued*

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[8] By order dated December 14, 1946, the Commission modified the order of November 30, 1946 by extending such 15-day period to 30 days (R. 29).

is acceptable to it" (emphasis supplied), and directed that the construction of the facilities shall be commenced not later than January 1, 1948 (R. 28). Under date of January 15, 1947, the Commission announced (FPC Release No. 3202) that it had received Michigan-Wisconsin Company's acceptance of said certificate (R. 103).

On November 30, 1946, the Commission also entered an order denying the several motions of petitioner to dismiss the application. Such order was entered without any conditions attached (R. 31).

Without further hearing, the Commission, by supplemental order of December 30, 1946, modified its said order of November 30, 1946 (which purported to issue the certificate) by attempting to add certain additional findings, and directed that the proceeding be reopened, limited, however, to the receipt of further evidence with respect to the provisions of the order of November 30, 1946, which imposed the condition that the facilities authorized shall not be used for the transportation for or sale of gas to Michigan Consolidated for resale in Detroit and Ann Arbor "except with due regard to the rights and duties of Panhandle Eastern in its established service for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act" (R. 35-42). By order dated January 3, 1946, the Commission fixed January 15, 1947 as the date for the commencement of the reopened hearing (R. 43).[9]

On December 27, 1946, petitioner filed application for reconsideration and vacation of the Commission's order of November 30, 1946 (which purported to issue the certificate) or, in the alternative, for a rehearing and a stay thereof (R. 10, 50). On the same day petitioner also filed application for a rehearing of the Commission's order of

[9] Such further hearing was held on January 15, 16 and 17, 1947, but no decision thereon was rendered by the Commission until after the petition for review had been filed in the court below. Panhandle offered no evidence at such hearing (R. 10).

November 30, 1946, which denied its motion to dismiss the application of Michigan-Wisconsin Company (R. 10, 81). On January 10, 1947, petitioner filed application for reconsideration and vacation or, in the alternative, for a rehearing of the Commission's supplemental order of December 30, 1946 and related order of January 3, 1947 fixing date of hearing thereon (R. 10, 90). By orders dated January 14, 1947, the Commission denied each of said applications for rehearing (R. 10, 45, 48). In denying the application for rehearing of the order issuing the certificate, the Commission made the following finding (R. 46):

> "The said applications for reconsideration and vacation or rehearing of the Commission's orders of November 30, 1946, and December 30, 1946, are premature, in that they are filed in advance of the issuance of the supplemental order contemplated in the order of November 30, 1946, and in advance of the issuance of the Commission's opinions herein."

On February 7, 1947, petitioner filed in the court below its petition to review and set aside the several orders of the Commission described above (R. 1). On February 24, 1947, petitioner filed a motion requesting the court to stay the order of November 30, 1946 (which purported to issue the certificate) and further proceedings by the Commission pending review (R. 99). The court denied said motion for stay by order of February 27, 1947 (R. 107).

On March 18, 1947, the Commission filed in the court below a motion to extend the time for the filing of the transcript of the record (R. 136).[10] Such motion did not allege any inability on the part of the Commission to file such record with the court, but contended that additional time

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[10] Section 19(b) of the Natural Gas Act provides that a copy of the petition for review shall be forthwith served upon any member of the Commission, and "thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered". A copy of the petition was duly served on a member of the Commission on February 7, 1947 (R. 175).

was desired for the purpose of enabling the Commission to take further administrative action, namely, to enable it to entertain applications which might thereafter be filed for a rehearing on opinions and a supplemental order which were issued by the Commission subsequent to the filing of the petition for review (R. 136).[11] However, such subsequent actions of the Commission were not made the subject of the review proceeding in the Court below. (R. 1)

On March 24, 1947, petitioner filed its objections to the Commission's motion to extend time for filing the record, in which petitioner contended that the opinions and orders, issued by the Commission subsequent to the filing of the petition to review, could not properly be made a part of "the record upon which the order complained of was entered," and that, therefore, it would be inappropriate and inconsistent with the requirements of Section 19 of the Natural Gas Act for the court to grant an extension of time for the express purpose of enabling the Commission to include in the transcript the record of proceedings and action taken by it subsequent to the date when the orders sought to be reviewed were entered (R. 174).

By order entered April 21, 1947, the court below, on its own motion and without assigning the matter for argument, dismissed the petition for review "without prejudice, however, to the right of petitioner to petition for review of the order of November 30, 1946, after it shall have become final by the issuance of a supplemental order or orders making same final" (R. 179-180). Such dismissal was predicated upon the finding by the court that (R. 179):

> "* * * the order of November 30, 1946, was not a final order because it required for completion the issuance of a supplemental order or orders, and the other orders above mentioned not being final and not having made final said order of November 30, 1946. * * *."

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[11] Such subsequent opinions and orders are Opinion No. 147, issued February 7, 1947, and Supplemental Opinion No. 147-A and accompanying order, issued March 12, 1947 (R. 154, 173).

The order of the court, moreover, denied without prejudice the motion of the National Coal Association and United Mine Workers of America for leave to intervene (R. 180).

REASONS FOR GRANTING THE WRIT.

(1) The court below has decided a question of general importance, and a question of substance relating to the construction or application of a statute of the United States, which has not been, but should be settled by this Court.

(2) The court below has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the Federal Power Commission, as to call for an exercise of this Court's power of supervision.

CONCLUSION.

For the foregoing reasons, stated more fully and supported by argument in the attached brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE ORDERS BELOW.

Reference to the orders of the Federal Power Commission and of the United States Court of Appeals for the District of Columbia is made in the petition, page 2.

II.

JURISDICTION.

The statutory provisions under which the jurisdiction of this Court is invoked are shown in the petition, page 3.

III.

STATEMENT OF THE CASE.

This appears in the petition, pages 3 to 12.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

Errors to be urged are those specified in the petition, page 3, under the heading "Questions Presented."

V.

ARGUMENT.

1. The Court Below Has Decided A Question of General Importance and a Question of Substance Relating to the Construction or Application of a Statute of the United States, Which Has Not Been, But Should Be, Settled By This Court.

The questions presented herein have not been passed upon by this Court. It is clear that such questions are of general importance and are of substance relating to the construction and application of Section 19 of the Natural Gas Act (52 Stat. 831; 15 U. S. C. 717 r). Section 19(b) of that Act provides that:

> "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in * * * the United States Court of Appeals for the District of Columbia, by filing in such court, *within sixty days after the order of the Commission upon the application for rehearing*, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *" (Emphasis supplied.)

Section 19(a) provides that:

> "Any person * * * aggrieved by an order issued by the Commission in a proceeding under this act to which

such person * * * is a party may apply for a rehearing *within thirty days after the issuance of such order.* * * * Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." (Emphasis supplied)

The primary order of the Federal Power Commission sought to be reviewed, dated November 30, 1946, purports on its face to "issue" a certificate of public convenience and necessity authorizing the Michigan-Wisconsin Company to construct and operate a pipeline extending from the Hugoton gas field in Texas into Michigan for the express purpose of supplying natural gas for resale and ultimate public consumption in petitioner's established "grandfather" markets in the Detroit and Ann Arbor areas (R. 21). Applications for rehearing of such order and the several related orders complained of were duly filed within the thirty-day period prescribed by Section 19(a) (R. 11-12). And the petition for review was duly filed in the court below within sixty days after the denial by the Commission of such applications for rehearing (R. 1). No question has been raised respecting petitioner's standing to appeal as a "party aggrieved".[1] Indeed, the respondent Commission did not move to dismiss the petition on the ground that such orders were not final and reviewable by petitioner.

The court below, on its own motion, and without notice, hearing or argument, summarily dismissed the petition for review on the ground that the Commission's order of November 30, 1946, "issuing certificate of public convenience and necessity" and the related orders complained of were not "final". (R. 179-180). The sole reason assigned by

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[1] See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470; *Federal Communications Commission* v. *National Broadcasting Co., Inc.* (KOA), 319 U.S. 239; *Associated Industries of New York State* v. *Ickes*, 2 Cir., 134 F. 2d 694.

the court for such conclusion was that the order of November 30, 1946 "required for completion the issuance of a supplemental order or orders." (R. 179). For a proper understanding of the court's ruling, it is necessary to turn to the language of the Commission's said order "issuing" the certificate. Such order provided in paragraph (B) (viii) that (R. 27):

> "This certificate is granted upon the express condition that the facilities herein authorized shall not be used for the transportation for or sale of gas to the Michigan Consolidated Gas Company for resale in Detroit and Ann Arbor except with due regard to the rights and duties of Panhandle Eastern in its established service for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act; and such rights and duties shall by supplemental order, to be issued within fifteen days from the date of this order, be determined on the basis of:
>
> "(1) Panhandle's rights, obligations and service under its Grandfather certificate and subsequent certificates when such certificates were granted by this Commission;
>
> "(2) Panhandle's contractual and actual deliveries of natural gas for resale in the years 1942, 1943, 1944, 1945 and 1946;
>
> "(3) Panhandle's rights and obligations at the date of termination of the existing contract, on December 31, 1951.
>
> "Jurisdiction is specifically reserved by the Commission to reopen these proceedings, if need be, for the purpose of such determination."

Paragraph (C) of said order provided, moreover, that:

> "For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later."

It will be noted that, notwithstanding the above-quoted provisions, the order on its face purports to "issue" a certificate and affirmatively directs the Michigan-Wisconsin Company to commence construction not later than January 1, 1948 (R. 21-28). Without awaiting the contemplated supplemental order, Michigan-Wisconsin Company advised the Commission of its acceptance of the certificate and began taking definite steps toward the construction of its project on the strength of the order of November 30, 1946 (R. 103). In its application for a stay of such order, petitioner alleged that such steps were being taken to the irreparable injury of petitioner (R. 103-104).[2] In the circumstances, it seems clear that, if the order of November 30, 1946 in fact issued a certificate of public convenience and necessity as stated by the Commission, such order is final and reviewable. As observed by this Court in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 425:

> "* * * The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken *in advance of other hearings and adjudications that may follow*, the results of which the regulations purport to control." (Emphasis supplied.)[3]

Moreover, if the order of November 30, 1946 in fact issued a certificate and is, therefore, reviewable, it seems apparent that the Commission exceeded its authority in undertaking by paragraph (C) to extend the statutory period within which applications for rehearing and petitions for review are required to be filed. Section 19(a) of the Natural Gas Act requires that applications for rehearing be filed "within thirty days after the issuance" of such

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[2] See *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4.

[3] Cf. *American T. & T. Co.* v. *United States*, 299 U. S. 232.

order. Section 19(b) provides that petitions for review must be filed in the court "within sixty days after the order of the Commission upon the application for rehearing". The Commission's attempt to postpone the commencement of the running of such statutory periods was without warrant in law. The court below, therefore, clearly erred in construing and applying Sections 19(a) and 19(b) of the Natural Gas Act in such manner as to permit the Commission to extend the period therein provided for the filing of the applications for rehearing and the petition for review.

The questions herein presented are of substance and of general importance and should be settled by this Court. The immediate impact upon the petitioner of the lower court's decision dismissing its petition to review the Commisison's orders is great, since such orders, if permitted to become effective, will deprive petitioner of its ability to utilize a substantial part of its pipeline facilities, used and useful in the public service, and a very considerable portion of its investment therein and revenues therefrom. Obviously, such decision is of great importance to a great number of natural-gas companies holding "grandfather" and other certificates and also to the consuming public. The Commission has noted probable jurisdiction over some 111 natural-gas companies having an aggregate utility plant account of about $2,057,000,000.[4] From February 7, 1942, the effective date of the amendment to Section 7 of the Natural Gas Act, to October 15, 1946, 319 applications for certificates of public convenience and necessity (other than "grandfather" applications) were filed with the Commission seeking authority to construct, acquire and operate facilities having an estimated cost of over $1,300,000,000. As of the latter date 92 of such applications were pending involving facilities costing about $444,000,000.[5]

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[4] Twenty-Sixth Annual Report of the Federal Power Commission, 1946, pp. 48-49.

[5] Federal Power Commission Staff Report Entitled "Administration of the Certificate Provisions of Section 7 of the Natural Gas Act", dated January, 1947, in Docket No. G-580, pp. 7-8.

We submit, therefore, that since the court below has decided questions of general importance and of substance relating to the construction or application of the Natural Gas Act, which have not been, but should be settled by this Court, the writ should be granted.

2. The Court Below Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings, And Has So Far Sanctioned Such A Departure By the Commission, As To Call for an Exercise of This Court's Power of Supervision.

The action of the court below in summarily dismissing on its own motion the petition for review without notice and without affording to the parties an opportunity to be heard was a distinct departure from the usual course of judicial proceedings calling for the exercise of this Court's power of supervision. As pointed out in Point 1, *supra*, the respondent Commission did not move to dismiss the petition for review *but sought an extension of time within which to certify the record* to the court below. Without acting upon such request, however, the court dismissed the petition, *sua sponte*. In the circumstances, it was the clear duty of the court below to give notice and opportunity for hearing to the parties with respect to the question whether the petition for review should be dismissed. The lower court's action, therefore, constitutes a denial of due process guaranteed to petitioner by the Fifth Amendment to the Constitution of the United States. *Morgan* v. *United States*, 298 U. S. 468, 481; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304.

Moreover, by permitting the Commission to extend the statutory period prescribed in Sections 19(a) and 19(b) of the Natural Gas Act for the filing of the applications for rehearing and petition for review (See Point 1, *supra*) the court below sanctioned a clear departure from the requirements of said sections of the Natural Gas Act, and usual

course of judicial proceedings. It seems clear, therefore, that such action calls for an exercise of this Court's power of supervision.

VI.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX.

The pertinent provisions of the Natural Gas Act of 1938, c 556, 52 Stat. 821 (15 U. S. C. §§ 717 *et seq.*), as amended by the Act of February 7, 1942, 56 Stat. 83 (15 U. S. C. § 717 f), are as follows:

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * *

SECTION 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas com-

pany to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may

issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

* * *

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable

grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 147

PANHANDLE EASTERN PIPE LINE COMPANY, A CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Court below filed no opinion. Its order dismissing the petition for review, without prejudice to the right of petitioner to petition for review of the order of November 30, 1946, after it became "final by the issuance of a supplemental order or orders," is set forth in the record (R. 179–180). The orders of the Commission (R. 21, 29, 31, 35, 43, 45 and 48) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered

on April 21, 1947 (R. 179–180). A petition for writ of certiorari was filed on June 24, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

On November 30, 1946, the Federal Power Commission issued a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company by an order which provided that a supplemental order should be issued determining the rights and duties of Panhandle Eastern Pipe Line Company,[1] an intervener, in a part of the market proposed to be served by means of the certificated pipeline. The order stated that "For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later." Without awaiting a supplemental order determining its rights and duties, petitioner applied for a rehearing before the Commission and, upon denial therof, for review in the court below of the order of November 30, 1946, and related orders, under Section 19 (b) of the Natural Gas Act. The court below

[1] Hereinafter sometimes referred to as petitioner or Panhandle.

dismissed the petition for review without prejudice to petitioner's right again to seek review of the certificate order after issuance of the supplemental order. Subsequent to the filing of the original petition for review a supplemental order was issued determining the rights and duties of petitioner. Petitioner has since filed a petition in the court below to review such supplemental order as well as the orders here under review.

The question is whether the order of November 30, 1946, and related orders issued prior to the supplemental order, are reviewable under Section 19 (b) of the Natural Gas Act.

STATEMENT

On September 24, 1945, Michigan-Wisconsin Pipe Line Company [2] filed an application with the Federal Power Commission for a certificate of public convenience and necessity authorizing, among other things, the construction and operation of a natural-gas transmission pipe line extending from Hansford County, Texas, to the Austin gas storage field in Mecosta County, Michigan, about 140 miles northwest of Detroit (R. 3–4).

The certificate application of Michigan-Wisconsin also requested authorization to lease and operate certain existing facilities of its affiliate,

[2] Hereinafter sometimes referred to as Michigan-Wisconsin.

Michigan Consolidated Gas Company,[3] as well as facilities to be constructed by the latter and a subsidiary thereof, and to acquire such leased facilities on December 31, 1951, and thereafter operate the same.

Petitioner was allowed to intervene to contest the issuance of the certificate (R. 49). Petitioner is an interstate pipe line company owning and operating an integrated natural-gas transmission pipe line system extending from Texas to Michigan. Petitioner sells natural gas for resale in the Detroit and Ann Arbor markets under presently existing contracts with Michigan Consolidated, expiring December 31, 1951. Michigan-Wisconsin initially proposed to replace petitioner as the supplier of Michigan Consolidated in these markets.

By order of November 30, 1946, the Commission issued a certificate of public convenience and necessity to Michigan-Wisconsin which attached certain conditions precedent to the operation of any facilities authorized therein. One such condition, paragraph (B) (viii) (R. 27), provides that the facilities authorized shall not be used for the transportation for or sale of gas to Michigan Consolidated for resale in Detroit and Ann Arbor "except with due regard to the rights and duties of Panhandle Eastern in its established service

[3] Hereinafter sometimes referred to as Michigan Consolidated.

for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act." Such rights and duties were to be determined by a supplemental order to be issued by the Commission within fifteen days[4] thereafter on the basis of (1) Panhandle Eastern's rights, obligations and service under its grandfather and other certificates, (2) its contractual and actual deliveries for the years 1942 to 1946, inclusive, and (3) its rights and obligations at the date of termination of the existing contract on December 31, 1951. Jurisdiction was specifically reserved by the Commission to reopen the proceedings, if need be, for the purpose of such determination (R. 9, 27).

The order of November 30, 1946, issuing the certificate further provided that (R. 28):

> (C) For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later.[5]

By order dated December 30, 1946 (R. 35–42), also under review, the Commission directed that

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[4] By order dated December 14, 1946, the Commission modified the order of November 30, 1946, by extending such 15-day period to 30 days (R. 29).

[5] The supplemental order referred to was issued March 12, 1947. See page 8, *infra*.

the proceeding be reopened, "limited, however, to the receipt of further evidence with respect to Subdivision (viii) of Paragraph (B) of the Commission's order of November 30, 1946, as modified by order of December 14, 1946." By order of January 3, 1947 (R. 43–44), also under review, January 15, 1947, was fixed for such reopened hearing.

On December 27, 1946, prior to the issuance of the supplemental order or the Commission's opinion, petitioner filed an application for rehearing of the Commission's order of November 30, 1946, issuing the certificate (as modified December 14, 1946) (R. 50–80). On the same date petitioner also filed application for a rehearing of the Commission's order of November 30, 1946, which denied its motion to dismiss the application of Michigan-Wisconsin (R. 10, 81).[6] By two separate orders dated January 14, 1947 (R. 45–47, 48), both here under review, the Commission denied each application for rehearing.

In its order of January 14, 1947, denying the application for rehearing of the certificate order of November 30, 1946, the Commission stated that such denial was "without prejudice to the filing, in accordance with the provisions of paragraph

[6] On January 10, 1947, petitioner filed an application for rehearing of the Commission's order of December 30, 1946, and the related order of January 3, 1947, fixing date of hearing (R. 10, 90).

(C) of said order of November 30, 1946, of other such applications for rehearing within thirty (30) days from the date of issuance of the opinions, or of the supplemental order contemplated in the Commission's order of November 30, 1946, whichever is later" (R. 47).

In such January 14, 1947, order the Commission found that good cause had not been shown for granting such applications in advance of the issuance of the supplemental order or opinions of the Commission, and that to do so "would invite a multiplicity of pleadings and proceedings" (R. 47).

On February 7, 1947, prior to the issuance of the opinion or supplemental order contemplated by the order of November 30, 1946, petitioner, purportedly acting pursuant to Section 19 (b) of the Natural Gas Act, filed in the United States Court of Appeals for the District of Columbia a petition for review (R. 1–19) of the Commission's two orders of November 30, 1946, of the orders dated December 30, 1946, and January 3, 1947, and of the two orders dated January 14, 1947, denying the several applications for rehearing.[7]

Thereafter, on February 24, 1947, petitioner filed a motion (R. 99–107) for a stay of further action by the Commission, particularly of the

[7] The Commission's Opinion No. 147 in these matters was not included in the petition, since the issuance thereof on the same day, February 7, 1947, followed in point of time.

issuance of the supplemental order and opinion referred to in the certificate order of November 30, 1946. The court below denied the motion for a stay by order of February 27, 1947 (R. 107).

On March 12, 1947, the Commission issued the supplemental order (R. 173–174) contemplated in subparagraph (B) (viii) of its order of November 30, 1946, and also on March 12, 1947, issued its accompanying Opinion No. 147–A (R. 154–172). Of course, neither Opinion No. 147, Opinion No. 147–A, nor the above-mentioned supplemental order of March 12, 1947, were included in the petition for review filed by petitioner on February 7, 1947 (R. 1–154, 173).

On March 12, 1947, the National Coal Association and the United Mine Workers of America, also interveners in the proceeding before the Commission, filed a motion for leave to intervene and for a stay (R. 109–134).

The Commission on March 18, 1947, filed in the court below a motion to extend the time for filing of the transcript of record (R. 136–174): "In order to protect the rights of review of the various parties [to the proceeding] hereto and to afford them an opportunity for filing petitions for rehearing with the Commission of all of its opinions and orders in accordance with Section 19(a) of the Natural Gas Act, and to provide sufficient time within which to permit the Commission to dispose of such petitions * * *" (R. 139).

Petitioner filed objections to the Commission's motion to extend the time for filing the transcript of record (R. 174–179), contending that the subsequent opinions of the Commission, namely Opinion No. 147, issued February 7, 1947, and Opinion No. 147–A, issued March 12, 1947, and the supplemental order issued on March 12, 1947, "have no bearing on the finality or reviewability of the order under challenge in this review proceeding" (R. 176).

On April 21, 1947, having under consideration the four pleadings [8] mentioned hereinbefore which contained all the record facts necessary to permit disposition of the petition, the court below, upon its own motion, dismissed the petition "without prejudice, however, to the right of petitioner to petition for review of the order of November 30, 1946, after it shall have become final by the issuance of a supplemental order or orders making same final" (R. 179–180).

On June 24, 1947, Panhandle filed the present petition for writ of certiorari to review the lower court's order of April 21, 1947.

On July 2, 1947, Panhandle filed a second petition for review in the court below, seeking review not only of the orders included in the first petition, but also a review of the Commission's Opinion No. 147 and Opinion No. 147–A, and

[8] The petition for review, the motion for leave to intervene, motion for extension of time to file the transcript, and objections thereto.

the supplemental order of March 12, 1947. The supplemental order for the first time determined petitioner's rights and duties with respect to the service rendered by it in the Detroit and Ann Arbor markets.

ARGUMENT

1. The petition which Panhandle filed in the court below on July 2, 1947, seeks review of the orders assailed in the petition here involved as well as of the supplemental order. We have been advised by the office of the Clerk of the Court of Appeals that in the normal course this proceeding would be heard by that court early in the fall.[9] A reversal by this Court in the present case would result merely in requiring the Court of Appeals to consider what is already before it.[10] Since petitioner will not be prejudiced by having the entire administrative proceeding reviewed by the court below at one time on the basis of its petition of July 2, there is no occasion for this Court to grant certiorari in the instant case.

2. The court below, upon its own motion, dismissed Panhandle's petition for review because it found that the issuance by the Commission of an

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[9] Any delay resulting from the length of the record would affect the present case if it were remanded as well as the case now before the Court of Appeals.

[10] This case would probably not be heard in this Court, if certiorari were granted, prior to the argument of the other case in the Court of Appeals.

order supplemental to those included in such petition was necessary to complete the administrative action. This supplemental order was that which was provided for by the Commission in subparagraph (B) (viii) of its order of November 30, 1946, issuing the certificate to Michigan-Wisconsin. The purpose of such supplemental order was to determine the rights and duties of petitioner in the Detroit and Ann Arbor markets. Prior to issuance of such supplemental order the Commission had not determined to what extent the facilities for which a certificate had been issued to Michigan-Wisconsin could be used for the transportation and sale of gas for resale in the Detroit and Ann Arbor markets.

The petition for review, however, included no orders reflecting action by the Commission subsequent to January 14, 1947, when the Commission denied the petitions for rehearing. The opinions of the Commission had not been issued and the supplemental order directly affecting the petitioner had not been entered at the time of filing the petition on February 7, 1947. The administrative process was thus not complete, and the Commission's orders which were before the court were not reviewable. *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375 and cases cited at 384–385.

Furthermore, at the time of the filing of the petition for review, petitioner was in no way aggrieved by the orders then under review, since

the orders excluded Michigan-Wisconsin from the Detroit-Ann Arbor area served by petitioner except in accordance with a determination in the supplemental order of petitioner's rights and duties in that area. Indeed petitioner has conceded (R. 53) that several years must elapse before pipe will be available for construction of the new pipe line, so that petitioner was not in any immediate danger as a result of the issuance of the certificate.

Petitioner's rights were, in this situation, fully protected by the Commission's postponing the operation of the order with respect to computing the time within which application for rehearing might be filed until after issuance of the supplemental order, and by its statutory right to judicial review of the Commission's determination on the application for rehearing.

3. Petitioner challenges the authority of the Commission to include in its certificate order of November 30, 1946, paragraph (C) which provides that:

> For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later (R. 28).

This proviso was included in the Commission's order in part for petitioner's protection to per-

mit the filing of petitions for rehearing with the Commission which would cover completed Commission action in this matter. The Commission by this proviso "made it possible to bring whatever was to be brought to a court with regard to the Commission's action concerning these petitioners in one appellate proceeding, thus escaping the partial review found in *Northwestern Electric Co.* v. *Federal Power Commission,* 9 Cir., 1942, 125 F. 2d 882." *Philadelphia Electric Power Co.* v. *Federal Power Commission,* 156 F. 2d 648, 649 (C. C. A. 3). Cf. Sec. 16, Natural Gas Act, 52 Stat. 830; *United States* v. *Baltimore & Ohio R. R.* Co., 284 U. S. 195, 203; *National Labor Relations Board* v. *New York Merchandise Co.,* 134 F. 2d 949 (C. C. A. 2); *Lownsbury* v. *Securities and Exchange Commission,* 151 F. 2d 217 (C. C. A. 3).

4. Finally, petitioner challenges the order of the court below because it was issued *sua sponte.* This the court had a right to do as the defect in the petition, the non-reviewability of the orders, was a jurisdictional defect "which courts must consider *sua sponte.*" *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 128, and cases cited in footnote 3 at 128.

CONCLUSION

The decision below is correct and fully accords with the decisions of this Court. Denial of certiorari will enable the court to review the action

of the Commission when the administrative process has been completed. We respectfully submit that the writ of certiorari should be denied.

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